

IN THE SUPREME COURT OF BELIZE, 2001 A.D

ACTION NO. 134 OF 2001

BETWEEN: MALCOLM WATTERS PLAINTIFF

AND

LOUIS ESCOBAR DEFENDANT

Mr. W. Elrington S.C., for the plaintiff.
Mr. P. Zuniga S.C., for the defendant.

AWICH J

27.4.2007

JUDGMENT

1. NOTES: *Claim for delivering up of possession of land based on title obtained by state grant – Minister’s Fiat; defence of bar to the claim under Limitation Act, Cap 170, and defendant’s possession prior to the issuing of Minister’s Fiat, the right of action of the claimant accruing first to the State, computation of limitation period. Counterclaim for title based on continuous and undisturbed possession for 30 years under the Law of Property Act, Cap. 170.*

2. The land area, the subject of this case, is the southern part of land said to belong to the claimant, Mr. Malcolm Watters, which southern part is the same as the northern part of land said to belong to the defendant, Mr. Louis Escobar. That land area claimed by both parties is best identified by describing the whole tract of land which the two lands said to belong to the parties respectively comprise, then the two lands regarded by the parties as belonging to them, and then the common part that both parties claim. The two lands that the parties regard as belonging to them comprise the whole tract of land that is relevant to this case.

3. The whole tract of land is situate at about Miles Ten, on the northern highway, Ladyville, Belize District. It adjoins the northern highway on the left, except for a narrow strip for road reserve. It starts at the junction where a feeder road from the Belize Defense Force Base (BDFB) joins the Highway. The feeder road itself is joined on the right (roughly the northern side) immediately after the junction by what is now no more than a track. It is a portion of the old northern highway. The track runs roughly parallel to the boundary along the

highway, and forms the other boundary, which I shall for convenience, refer to as the western boundary. The highway at that stretch runs in the NNW direction, and so does the whole tract of land. The tract of land ends NNW at where another tract of land said to have been reserved by Minister Fonseca for a public park starts. The southern boundary of the whole tract of land with which we are concerned is in the SSE direction. It is the curve formed by the junction of the highway with the feeder road from the BDFB, and the junction of the BDFB road with the portion of the old northern highway. This southern boundary is geometrically roughly in the shape of a parabola, with the junctions forming the curve. It is common ground that the entire land was national land before claims for portions were made by the parties in this case.

4. In the year 2000, a survey of the land area was carried out by one Elvis Usher of the office of the Commissioner of Lands. He filed a survey plan dated 20.9.2000; it is now exhibit C (MW) 2 B, in the evidence. The survey was carried out because the Minister responsible for lands decided to grant the whole tract of land to Mr. Watters. It was said that much earlier a certain land in a nearby area,

belonging to Mr. Watter's mother, had been expropriated for public purpose. At the time of trial Mr. Watters, aged 75, lived at No. 5 Baymen Avenue, Belize City, and worked as a security guard. He or his mother had not lived on the land in question.

5. At the survey, a line measuring 77.789 metres was drawn from the highway across the land, to the western boundary. It is roughly north of the southern junctions so that there is now an area bounded by the line itself, the southern part of the highway, the junctions and the rest of the southern boundary, and part of the western boundary. The bounded area measures 0.701 of an acre in area. Within it there are two large wooden houses and a small one, near the southern junctions; they belong to Mr. Escobar. Mr. Cecil Arnold, a witness called by the claimant, explained that the Lands Department, by the line drawn, "excised" off that southern part of the land on the advice given by the witness so as to give the portion to Mr. Escobar, because he had already developed that portion. Mr. Arnold was a principal surveyor in the Lands Department. The other part of the whole tract of land, the NNW part, was demarcated into a parcel measuring 3.238 acres in area. It was granted by a Minister's Fiat to Mr.

Watters. Its boundary adjoining the northern highway measures 171.021 metres from the line separating the area intended for Mr. Escobar. The western boundary measures 199.438 metres from the line. The northern boundary is not a straight line, it is staggered; it measures 149.899 metres (ignoring the staggering); it is the boundary with the land reserved for a public park and maybe other lands. The area reserved for a park, and which is not fully shown on the survey plan in evidence measures 1.190 acres.

6. On 29.9.2000, a Minister's Fiat No. 793 of 2000, was issued for the 3.238 acres parcel of land out of the whole tract, to Mr. Watters. In law it conferred an, "*estate in fee simple*", on Mr. Watters – see **s: 2 of National Lands Act, Cap. 191 Laws of Belize**. It appears that the 0.701 of an acre southern part was offered to Mr. Escobar for purchase, but he did not take up the offer.

7. There is one other important feature of the whole tract of land. Between the southern junctions, but beyond the southern survey line measuring 77.789 metres, and the northern boundary of the whole tract of land, there is a track running from the highway across to the

western boundary. It is called Cloth Road. It is used as a foot path. It has not been shown on the survey plan. This Court had it measured; it is 10 metres wide where it meets the highway, but narrows westwards. It is more or less straight, but runs at an oblique angle to the highway. Along the southern side of Cloth Road is a line of trees and a barbed wire fence. There is no line of trees or fence on the northern side. The barbed wire fence runs from the junction of the highway with Cloth Road, along the southern edge of Cloth Road up to the junction with the old northern highway and down the western boundary, then along the curved southern boundary at the junctions, and up along the highway up to where Cloth Road meets the highway. So the barbed wire encloses a larger part of the southern area of the whole tract of land than the area offered to Mr. Escobar. This southern part is comprised of the area where the two wooden houses are, which area has been offered to Mr. Escobar, and the southern part of the 3.238 acres parcel of land up to Cloth Road. It is the entire southern part enclosed by barbed wire fence which Mr. Escobar claims as his land. The actual area of it was not measured. Mr. Watters claims part of it, namely; from the survey line measuring 77.789 metres which is the southern boundary of the demarcated

parcel measuring 3.238 acres, to Cloth Road. The whole area that Mr. Watters says belongs to him stretches from the southern line measuring 77.789 metres past the barbed wire fence and Cloth Road, up to the boundary with the land reserved for a public park. So the area claimed by both Mr. Watters and Mr. Escobar is that starting at the southern survey line measuring 77.789 metres and ending at the barbed wire fence along the edge of Cloth Road.

8. Expert evidence was not led as to how much in area is the whole southern part of the land, enclosed by the barbed wire fence. In court Mr. Escobar estimated the area at 1½ acres, although his statement of claim stated it as 10 acres. The Court visited the land and would say it would be near the 1½ acres estimate.

The Contentions.

9. The bond of contention is in the two paragraphs following. Mr. Watters says that on the strength of the Minister's Fiat, he is the holder of a fee simple title to the parcel of land starting from the line measuring 77.789 metres, and north of the junctions, stretching past the barbed wire fence and Cloth Road to the north, and on up to the

boundary with the land reserved for a public park. The land measures 3.238 acres in area. He says he is entitled to possession of the entire parcel on the basis of the Minister's Fiat. He complains that Mr. Escobar has been working part of that land north of the 77.789 metres line, up to the barbed wire fence along the southern side of Cloth Road; he has been building a concrete house near Cloth Road, so Mr. Watters asks the Court for an order for delivery up of possession and mesne profit from the date that the writ of summons was served on Mr. Escobar.

10. On 24.4.2001, Mr. Watters obtained an interlocutory injunction order which stopped the building work that Mr. Escobar was engaged in near Cloth Road. Mr. Watters gave an undertaking as to damages in the event it should be determined that he ought not to have applied for the interlocutory injunction order.

11. Mr. Escobar says he entered the land area in 1970 from the area where the junctions are and by 1971 he had cleared the land up to Cloth Road, and in 1972 he fenced the land. He does not have documentary title, but claims to have the so-called possessory title.

He testifies that he had the land land-filled, except for a small area in the centre where there is a water pond; he fenced the whole land area with barbed wire, built the wooden houses in the southern part near the junctions and another wooden hut along the western boundary, and planted mango trees, coconut trees, and other trees on the land. He says he rented the wooden houses for the business of a bar and restaurant from 1970. He adds that he kept cows and horses on the land, but had to take some away because people stole some of the animals. His contention is that the State's title to the land he fenced has been extinguished under s: 22 of the Limitation Act, cap 170, Laws of Belize, because the government did not bring action to recover the land within the time limited for bringing the action. He further contends that the Minister's Fiat was obtained in the year 2000, when he, Mr. Escobar, was already on the land, so any right accruing from the Fiat is subject to his interest.

12. Mr. Escobar counterclaims under s: 42 of the Law of Property Act, Cap. 190, Laws of Belize, and asks for a court declaration of a fee simple title to the land area he has fenced on the ground that he has been on the land for more than 30 years. In other words Mr. Escobar

asks the Court to declare a fee simple title in his favour, to the southern part of the whole tract of land, starting from the southern junctions and stretching up to the fence on the edge of Cloth Road.

13. Mr. Escobar also complains that it was one Egbert Cattouse who was actively trying to take away the part of the land that Mr. Escobar says he occupies. He says that Mr. Cattouse took Mr. Watters in a car to the land and put up a 'for sale' sign; it was Mr. Cattouse who came out of the car and spoke to him; Mr. Watters remained in the car.

Determination.

14. That Mr. Watters' claim may have been encouraged by another for profit from sale of the land is irrelevant in deciding who has rights or better rights to the area of land claimed by both parties. The Court will concern itself with the question of rights and not any inducement in deciding this case.

15. Both counsel cited in their submissions provisions of the Limitation Act. Learned Counsel Mr. W. Elrington S.C., for Mr. Watters, cited

s: 12 for the rule that proceedings by the State to recover land is barred after 30 years from the date when the right of action accrued, and that proceedings by a private person to recover land is barred after 12 years from the date when the right of action accrued. He submitted that his client, Mr. Watters, had 30 years to bring his claim to court because the right of action accrued first to the State. Learned counsel Mr. P. Zuniga S.C., for Mr. Escobar cited s: 22 for a proposition that proceedings by the State for possession of the land occupied by Mr. Escobar has been extinguished after 12 years from 1970 when Mr. Escobar first entered the land. The sections are set out here:

“12. (1) No action shall be brought by the Crown to recover any land after the expiration of thirty years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through whom the Crown claims, to that person.

Provided...

(2) No action shall be brought by any other person to recover any land after the expiration of twelve years from the

date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person:

Provided that if the right of action first accrued to the Crown through whom the person bringing the action claims, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown or of twelve years from the date on which the right of action accrued to some person other than the Crown whichever period first expires.”

16. The detailed submission by Mr. Elrington was that: taking the testimony of Mr. Max Tejeda, witness for Mr. Escobar, that he saw Escobar ran the barbed wires up to Cloth Road in 1978, and accepting that it “constituted occupation, the Government then had 30 years from 1978, to institute legal proceedings against the defendant to remove him....” If that was accepted, Mr. Elrington continued, then the case of the State or of Mr. Watters who on 29.9.2000, succeeded the State in title, could not be regarded as time barred under s: 12 of the Limitation Act, because proceedings

were taken in court on 6. 3.2001, twenty three years, not thirty years, after Mr. Escobar started to occupy the area near Cloth Road in 1978. Mr. Elrington computed that the Government or Mr. Watters had 8 years left from 6.3.2001, to bring court action.

17. Mr. Elrington's submission was dependent on the Court accepting that the upper part of the fenced area was occupied by Mr. Escobar only from 1978 when the witness said a fence was put up. I do not accept that conclusion. The witness further stated that there were already old posts for wire fence when in 1978, he saw Escobar ran fence wires round the area.

18. From observation by Court at the site, some of the posts all round from the southern boundary to the fence along Cloth Road, were older than others. Some of the barbed wires were also older and broken, and some had been well imbedded into tree trunks grown over them where the wires rested on the tree trunks. The difficulty faced by Mr. Watters was that neither he nor any of his witnesses was in a position to say when the old or new barbed wires were possibly put up. Mr. Watters said he inspected the land only after he had

obtained the Minister's Fiat. That was after 29.9.2000. That left the Court with only the testimonies of Mr. Escobar and his witnesses.

19. Mr. Escobar testified that he started to clear the land in 1970 and by 1972 when he erected barbed wire fence round the entire area, he had completely cleared the land area. I accept that testimony. Fencing round a piece of land is clear evidence, but not the only evidence, that the occupier has taken factual possession and intends to retain possession to the exclusion of all the world, including the owner, in this case the State. It is clear evidence of the factual possession and of the *animus possidendi* – see ***Higgs and another v Nassauvian Ltd [1975] 1 All E.R 95.***

20. Possession that is required under ***5:12 of the Limitation Act*** to resist proceedings after 30 years or 12 years; and under ***s: 42 of the Law of Property Act*** to acquire title is comprised of (1) factual possession and (2) *animus possidendi*, an intention to exclude others including the owner, it is manifested in the exercise of custody and control on one's own behalf and for one's own benefit. Factual possession may

be proved by direct or indirect physical occupation and control or by evidence that the possessor has been dealing with the land as his own.

21. The evidence of occupation, the factual possession, and of exclusive possession, the *animus possidendi*, in this case is more than the fence. The side of the highway from the junction with the feeder road from BDFB all the way to the junction with Cloth Road is lined with trees in a straight line, intended for the boundary. Among them are mango trees on the southern part offered to Mr. Escobar, and also at the junction of Cloth Road with the highway. In between there are berries trees and hammons trees in a straight line. Old and new barbed wires are well imbedded into the trunks of some of those trees. There are also old trees in a straight line along the southern edge of Cloth Road and along the western boundary at the old northern highway, right from Cloth Road down to the wooden houses. Some of the trees are pretty old. Again the trees were mango trees, berries trees and hammons trees. Obviously they were either planted along what were intended for boundaries or were left standing along what were intended for boundaries when other trees were cut down. There are also some mango trees and coconut trees

within the enclosed land area, and a water pond in the middle. Of course, the Court cannot fix the year when the trees on the boundaries and within the enclosed land were planted or left standing. Mr. Watters and his witnesses were also not in a position to say how old the trees were. So when there has been positive evidence by Mr. Escobar that he planted the trees from 1970, and there has been no evidence to the contrary, it is reasonable for the Court to give the benefit of the doubt to Mr. Escobar and accept his evidence.

22. From, the evidence as a whole and from the observation by the Court, it was reasonable to conclude that although Mr. Escobar did not start to build “a concrete house” in the northern part of the fenced and enclosed land until 1984 or 2000, that area had much earlier been made distinctly identifiable as one with the southern part which had wooden buildings on and was actively used for a bar and restaurant business since 1970. On a balance of probabilities I have concluded that Mr. Escobar has proved that from 1970 he occupied the entire area which has been enclosed within the barbed wire fence and that he intended exclusive possession. The area is only part of the whole tract of the land surveyed. Legal proceedings to remove Mr. Escobar

were brought on 6.3.2001. That was over 30 years, after Mr. Escobar occupied the land belonging to the State. Time limited for the State to bring court proceedings to recover the land had expired, accordingly legal proceedings to recover the land area occupied by Mr. Escobar were time barred by *s: 12 of the Limitation Act*.

23. I note that the proceedings were taken by Mr. Watters, a successor to the title of the State. Limitation period in that situation is provided for in *the proviso to s: 12(2)* which states:

“Provided that if the right of action first accrued to the Crown through whom the person bringing the action claims, the action may be brought at any time before the expiration of the period during which the action could have been brought by the Crown or of twelve years from the date on which the right of action accrued to some person other than the Crown, whichever period first expires.”

24. In this case Mr. Watters obtained Minister’s Fiat on 29.9.2000; that is when the right of legal action accrued to him personally, and will

expire 12 years from that date, on 29.9.2012. That is later than the date on which the right of action that accrued first to the State, the predecessor in title, would expire, 30 years from 1970, which was the year 2000. That earlier expiration date is the operative date.

25. With greatest respect, Mr. Zuniga's submission that under s: 22, the title of Mr. Watters to the land enclosed by wire fence was extinguished 12 years after the cause of action first arose is incorrect. Section 22 states:

“22. Subject to the provision of section 15 and of any law relating to the registration of titles, at the expiration of the period prescribed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished”

26. It is true that the person who brought action here is Mr. Watters not the State, and that the period prescribed in s: 12 for him to bring action is 12 years, however, the action to recover the land first accrued to the State, and has expired first, that is, before the right that

accrued to Watters will expire on 29.9.2012. The proviso to s: 12(2) quoted above applies so that the period limited for bringing action in this case is that available to the State, namely 30 years from 1970, which has expired first. Accordingly the title of Mr. Watters to the land was extinguished 30 years from 1970, that is, in the year 2000.

27. Fortunately for Mr. Zuniga, the error does not affect the outcome of this case. I have already held that Mr. Escobar occupied the entire land area enclosed within the barbed wire fence in 1970, and that was over 30 years before 6.3.2001, when these proceedings were brought to Court. The right of the State to the land was also extinguished 30 years from 1970, that is in the year, 2000. When the Minister's Fiat issued on 29.9.2000, the State had only about three months before it lost its title to the land enclosed, and had the same three months to bring proceedings to recover the land from Mr. Escobar. The three months were allowed to pass without proceedings being brought. The right of action was barred at the end of the year 2000.

28. The Minister's Fiat of 29.9.2000, is a nullity to the extent that it included in the land granted, any part of the land south of the fence at

Cloth Road. The Fiat is not affected by this judgment to the extent that it makes grant of the land north of the wire fence on the southern edge of Cloth Road.

29. The submission that Mr. Watters would take the land subject to the right of Mr. Escobar who was in possession when Mr. Watters obtained title becomes irrelevant. Section *42 of the Law of Property Act and s: 12 of the Limitation Act* are expressly applicable to national land, which this land is. Limitation period to bring proceedings and prescription after 30 years apply to the land the subject of this claim.

30. One point needs to be mentioned. It is in evidence that Mr. Escobar applied for Minister's Fiat for the fenced area of land, and it may be said that Escobar acknowledged the right of the State over the land, so the right of action had not yet accrued to the State or its successor in title, Mr. Watters. Recent case law is that such an acknowledgment does not always repudiate an intention to have exclusive possession and does not prevent the right of action from accruing or continuing. *JA Pye (Oxford) Ltd and Another v*

Graham and Another [2002] UKHL 30 and *Buckinghamshire County Council v Moran [1989] 2 All ER 225*, are cases in point. In the former case, the farmer was even prepared to pay for the use of the farmland if he was asked to; he was never asked for over 12 years. In the latter case the respondent acknowledged that he would give up the land if it was required for the intended purpose, a public road. He was not asked to vacate the land until after the limitation period had expired. In both cases it was held that actual possession and the intention to have exclusive possession were proved.

The Court Orders Made.

31. The claim of Mr. Malcolm Watters, filed on 6.3.2001, is dismissed. Judgment is entered for Mr. Louis Escobar in the counterclaim, for a declaration of title. This Court makes a declaration of a fee simple title in favour of Mr. Luis Escobar, to the piece of land enclosed by barbed wire fence running from the junction of Cloth Road with the northern highway westwards along the southern edge of Cloth Road up to where it meets the portion of the old northern highway, and down in the SSE direction up to the junction with the feeder road

from the Belize Defence Force Base, and up in the NE direction up to the junction with the northern highway, and then upwards in the NNW direction up to where it meets the junction with Cloth Road.

32. A survey plan will be prepared and filed at Lands Department. The Registrar General is directed to carry out the declaratory order made, by having title of Mr. Louis Escobar to the fenced and enclosed land registered in accordance with *s: 42(4) of the Law of Property Act*.

33. The interlocutory injunction order made on 24.4.2001, restraining Mr. Escobar from continuing with the building work near Cloth Road or entering the area is discharged. The injunction was wrongly obtained, the Court orders the undertaking offered by Mr. Watters to be realised to pay agreed damages or damages to be proved and assessed. The Court further orders Mr. Watters to pay costs of these proceedings to be agreed or taxed.

34. Delivered this Friday the 27th day of April, 2007

At the Supreme Court

Belize City

Sam Lungole Awich

Judge

Supreme Court of Belize